Filed 2/28/19 In re C.J. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re C.J., a Person Coming Under the Juvenile Court Law.	B289075 (Los Angeles County Super. Ct. No. CK85519)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. S.J., et al., Defendants and Appellants.	

APPEAL from an order of the Superior Court of Los Angeles County, Steven E. Ipson, Commissioner. Affirmed, but conditionally remanded.

Konrad S. Lee, Diamond Bar, for Defendant and Appellant Christopher F.

Mitchell Keiter, Beverly Hills, for Defendant and Appellant Salinna J.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Brian Mahler, Deputy County Counsel, for Plaintiff and Respondent.

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In this juvenile dependency case, the Los Angeles County Department of Children and Family Services (the Department) had a clear lead as to whether a child, C.J., had American Indian heritage, but did not follow up on that lead. This was error under the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.). Christopher F. (father) seeks reversal of the order terminating his parental rights, while Salinna J. (mother) has filed a "no merit" brief under *In re Phoenix H.* (2009) 47 Cal.4th 835. The ICWA error does not compel us to vacate the order terminating either parent's rights, but does require a remand for the Department to complete the necessary investigative follow-up and, if necessary, provide notice in compliance with ICWA.

FACTS AND PROCEDURAL BACKGROUND

I. Generally

Mother and father have one child together, C.J. He was born in September 2009.

At the time of C.J.'s birth, his father was in custody on murder charges. By April 2011, father was convicted and sentenced to 15 years to life in state prison. By that time, mother was using methamphetamine.

In mid-April 2011, the Department filed a petition seeking to exercise dependency jurisdiction over C.J. due to (1) mother's

substance abuse, which placed 20-month-old C.J. at substantial risk of serious physical harm (rendering jurisdiction appropriate under Welfare and Institutions Code section 300, subdivision (b)(1)),[1] and (2) father's prior and future incarceration, which meant father had not and could not provide for C.J.'s care (rendering jurisdiction appropriate under section 300, subdivisions (b) and (g)).

In June 2011, mother pled no contest to the substance abuse allegation, and the trial court dismissed the remaining allegations. The court ruled father ineligible for reunification services due to his conviction of a violent felony (§ 361.5, subds. (a) & (b)(12)), but ordered reunification services for mother. The court terminated those services in November 2012 due to mother's noncompliance with her case plan.

After many continuances and delays, and after denial of mother's motion to reinstate reunification services, the juvenile court in early 2018 held three days of hearings regarding termination of parental rights and placement. The juvenile court terminated both parents' parental rights over C.J. on March 5, 2018.

Each parent filed a timely notice of appeal.

II. Specifically, as to ICWA

Mother has consistently denied any Indian ancestry.

In April 2011, father reported that "one or more of [his] parents, grandparents, or other lineal ancestors is or was a member of a federally recognized tribe" and named the paternal great grandparents as persons with more information. He provided their phone number.

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1 All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

At a hearing that followed, the juvenile court orally ordered the Department to "interview the paternal great grandparents and document any American Indian heritage by family members." Echoing the oral ruling, the juvenile court's minute order provided that the Department was to "investigate [father's] claim" of possible ancestry by "contact[ing] the party claiming possible American Indian heritage." The minute order also stated that the Department was to file a "supplemental report" that "detail[ed] . . . who was interviewed, [and] dates and places of birth of the relatives as far back as can be ascertained."

In May 2011, the Department contacted the paternal great grandmother. She reported that *her* grandmother "may have Mayan Indian heritage" (rather than Native American Indian heritage). The paternal great grandmother nevertheless "stated that she would contact a cousin who may have additional information regarding possible Native American Indian heritage."

At the hearing that followed this report, the juvenile court noted that "there's a cousin who may have additional information," and ordered the Department to "follow up to make sure that this cousin doesn't know anything" and then to prepare a "supplemental report." The ensuing minute order dictated that the Department was also "to make [its] best efforts to interview father in state prison regarding possible Indian heritage."

In June 2011, the Department re-contacted the paternal great grandmother to see if she had contacted her cousin, and learned she had not. At a subsequent hearing, the parental great grandmother explained that she opted not to contact the cousin once C.J. was removed from her care.

The Department took no further action to contact the cousin.

The juvenile court ruled that "there's no reason to believe or to know that this child falls within" ICWA "[b]ased on the information the court has before it," and concluded that ICWA did not apply.

DISCUSSION

Father argues that the court's 2018 order terminating his parental rights must be reversed because the juvenile court did not comply with ICWA. Although the court made its ICWA ruling in June 2011, that ruling may be challenged as part of this appeal from the court's March 2018 order terminating parental rights. (*In re N.G.* (2018) 27 Cal.App.5th 474, 485.) In assessing whether a court has complied with ICWA, we review the record for substantial evidence. (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430 (*Rebecca R.*).) In so doing, we "'"presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order." [Citation.]'" (*In re Charlotte V.* (2016) 6 Cal.App.5th 51, 57, citing *In re I.W.* (2009) 180 Cal.App.4th 1517, 1525.) Alleged violations of ICWA's notice requirement are subject to harmless error review. (*In re E.R.* (2016) 244 Cal.App.4th 866, 878.)

ICWA was enacted to curtail "the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement." (*Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32.) Under ICWA and the California statutes our Legislature enacted to implement it (§§ 224-224.6), a juvenile court—and, as its delegate, the Department—have (1) a duty to investigate whether a child is an "Indian child" and, if the court "knows or has reason to know" that he is, (2) a duty to notify the child's parent and either the Indian child's tribe or, if the tribe is unknown, the

Secretary of the Interior and the Bureau of Indian Affairs. (25 U.S.C. § 1912, subd. (a); see also 25 U.S.C. § 1903(11); §§ 224.2, subd. (d)(4) & 224.3, subds. (a), (c) & (d); Cal. Rules of Court, rule 5.481(a).) Once notified, the tribe then decides whether the child is, in fact, an "Indian child"—that is, a child who (1) is "a member of an Indian tribe," or (2) "is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4); §§ 224.1. subd. (a) & 224.3, subd. (a)(3); *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1165.)

To satisfy ICWA's duty to investigate, the juvenile court (and its delegate, the Department) "is required . . . to interview the child's parents, extended family members, . . . and any other person who can reasonably be expected to have information concerning the child's membership status or eligibility" in an Indian tribe. (*In re Michael V.* (2016) 3 Cal.App.5th 225, 233; *In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1386; *In re K.R.* (2018) 20 Cal.App.5th 701, 706 (*In re K.R.*) ["The court and the agency must act upon information received from any source, not just the parent . . . "].) Because ICWA does not obligate the court or the Department "to cast about" for investigative leads (*In re Levi U.* (2000) 78 Cal.App.4th 191, 199), the court and Department satisfy their duty to inquire if the parents "fail[] to provide any information requiring follow-up" (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1161; *In re B.H.* (2015) 241 Cal.App.4th 603, 608; *In re C.Y.* (2012) 208 Cal.App.4th 34, 42), or if the persons who might have additional information are deceased (*In re J.D.* (2010) 189 Cal.App.4th 118, 123), or refuse to talk to the Department (*In re K.M.* (2009) 172 Cal.App.4th 115, 119). (See generally *In re Hunter M.* (2011) 200 Cal.App.4th 1454, 1468 (*Hunter M.*) [no duty to investigate further where no contact information was provided for only relative with any information].) But if there *is* a viable lead, the Department "has

the obligation to make a meaningful effort to locate and interview extended family members to obtain whatever information they may have as to the child's possible Indian status." (*In re K.R.*, at p. 709.)

Substantial evidence does not support the conclusion that the juvenile court and the Department satisfied ICWA's duty to inquire. The Department had information from the paternal great grandmother that her cousin might have additional information regarding C.J.'s possible Indian heritage. But the Department never contacted the cousin. The great grandmother's personal decision not to contact the cousin did not relieve the Department of its obligation to do so, particularly as there is no evidence that the cousin was uncooperative, unavailable or unalive. The Department simply dropped the ball. ICWA does not tolerate such a fumble. (*In re J.M.* (2012) 206 Cal.App.4th 375, 381 ["Thorough compliance with ICWA is required."].)

The Department responds that its omission was harmless because father has not established or alleged that the paternal great grandmother's cousin would have confirmed C.J.'s Indian heritage. This argument is a non-sequitur. Where, as here, the defect is the *Department*'s failure to investigate, how can the *parent's* failure to allege what a proper investigation would have produced render that deficiency harmless? Anything the parent says or alleges about the outcome of a properly conducted investigation is pure speculation, and we do not see how the failure to make a speculative allegation renders ICWA error harmless. (*In re J.N.* (2006) 138 Cal.App.4th 450, 461.)

Father alleges two further defects with the Department's investigation, but neither has merit. He faults the Department for not interviewing him a second time, as the juvenile court ordered it to do in its May 16, 2011 minute order. This failure is

harmless because father repeatedly asserted that he did not personally have any knowledge about his Indian heritage and that he had already provided all of the information he had. The Department's failure to ask a question to which it already knew the answer was harmless. (*In re C.Y.*, *supra*, 208 Cal.App.4th at p. 40.) Father also faults the Department for not reporting back with "the dates and places of birth" of C.J.'s relatives, as ordered in its April 2011 minute order. But that information was relevant should notification become necessary; at this point, due to the deficient investigation, it is still unknown whether C.J. has any Indian heritage. Thus, at this point, this omission is harmless.

Where, as here, the Department has not complied with its duty to investigate under ICWA, the remedy is not to reverse the order terminating parental rights because "there is not yet a sufficient showing that the child is, in fact, an Indian child within the meaning of ICWA." (*Hunter W.*, *supra*, 200 Cal.App.4th at p. 1467; accord *In re D.C.* (2015) 243 Cal.App.4th 41, 64 [declining to reverse dispositional orders where there is not yet a sufficient showing that the minor is an Indian child].) Instead, the remedy is to "remand with instructions to ensure compliance with ICWA." (*Hunter W.*, at p. 1467.) We are mindful that it is now 2019, that the juvenile court's ICWA finding is nearly eight years old, and that C.J. is nearly 10 years old. But ICWA safeguards the rights of Indian tribes to participate in cases involving Indian children; no amount of failure by the Department or delay in the process of litigating the dependency case vitiates those rights.

DISPOSITION

The juvenile court's order terminating parental rights is conditionally remanded, and the court is directed to properly comply with the inquiry and notice provisions of ICWA. If, after proper inquiry and notice, the court finds that C.J. is an Indian child, the court shall proceed in conformity with ICWA. Otherwise, the court's order is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ